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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-eighth session

# SUMMARY RECORD OF THE 555th MEETING

Held at the Vienna International Centre, Vienna,
on Monday, 8 May 1995, at 9.30 a.m.

**Chairman:** Mr. GOH (Singapore)

**Chairman of the Committee of the Whole:** Mr. GAUTHIER (Canada)

CONTENTS

Draft Convention on Independent Guarantees and Stand-by Letters of Credit (*continued*)

Article 19 (*continued*)

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*The meeting was called to order at 9.35 a.m.*

**DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT** (*continued*) (A/CN.9/405, A/CN.9/408, A/CN.9/411)

**Article 19** (*continued*) (A/CN.9/408, annex)

1. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said that the discussion on article 19 so far had shown that there existed in substance only two possible approaches, which might be called the "shall" approach and the "may" approach. Under the "shall" approach, where it was manifest and clear to the guarantor that, in view of the conditions stated in paragraph (1) (a) (i), (ii) and (iii), any payment made would be in bad faith, the guarantor must not pay. The alternative would be that, in the same situation the guarantor/issuer might — rather than must — refuse to pay. The exception to the obligation to pay a demand made in accordance with article 14 could therefore be expressed either by a prohibition limited to very specific circumstances, or by language that did not set out in detail the various types of fraud but merely indicated that in certain situations payment might be refused. He would caution those preferring the "may" approach against including all kinds of conditions, such as making the right to refuse subject to the view of the guarantor/issuer or to the question of bad faith, as such restrictions might make matters less clear. He invited speakers to indicate their preference for one of those two approaches without going into great detail.

2. **Mr. BYRNE** (United States of America) said that, after consulting his Government and the banking community, his preference was for a formulation based on a right to withhold payment to the beneficiary. If his suggested formulation was adopted, there would be no need to refer to a contractual right to indemnification in the text, since there would be an understanding between the parties that such a right, though not mentioned, would be available. The formulation he proposed was as follows: "If, in the view of the guarantor/issuer, acting in good faith and with due regard to generally accepted standards of international practice of independent guarantees or stand-by letters of credit, it is clear and manifest that a ground for non-payment exists, the guarantor/issuer has a right to withhold payment to the beneficiary". A reference to where such grounds for non-payment were formulated in the text would be inserted as appropriate. The suggested approach combined a number of useful elements, including good faith, generally accepted standards of independent guarantees and stand-by letters of credit, the "manifest and clear" requirement, the right to withhold payment and the restriction of the scope by the words "to the beneficiary". Though the other approach would if necessary be acceptable, he felt that the one he suggested represented a useful compromise.

3. **Mr. EDWARDS** (Australia) considered that the suggestions so far put forward in connection with article 19 did not deal entirely satisfactorily with the matter of central concern to bankers, namely, that article 19, as currently drafted, did not provide sufficient certainty to encourage the financial community to support the Convention. The banking community in Australia was particularly concerned that the grounds set out in paragraph 1 (a), by requiring too broad a range of judgements by the guarantor, would make his position untenable. If the necessary documents were presented in proper fashion, the guarantor should be required to pay, except in the case of fraud to which the beneficiary was a party. The banking community was also concerned about the effect upon the assignee's position: when the latter demanded payment, he should not be met with some defence referring to wilful misconduct or fulfilment of the underlying obligation. Though the bankers' views should not be regarded as determinant, they drew attention to the fact that article 19 should not be so broad-ranging and conducive to uncertainty that it weakened the fundamental obligation referred to in article 17, namely, that a demand made in accordance with the provisions of article 14 would, in normal circumstances, result in immediate payment. Accordingly, the debate as to

(*Mr. Edwards, Australia*)

whether article 19 should deal with a right or an obligation not to make payment should not detract from the more important need to achieve a sufficient degree of certainty to safeguard the integrity of the obligation specified in article 17. If the grounds for non-payment could be defined with maximum certainty, they could be backed up by a requirement that payment must not be made in such circumstances. If, on the other hand, such a degree of certainty could not be achieved, the Convention might have to make the right to refuse payment discretionary, as in the United States proposal. In short, the choice of approach would depend on whether greater certainty could be achieved in the grounds mentioned in article 19 (1) (a) than was at present the case.

4. **Mr. SHISHIDO** (Japan) said that, in his view, there was only one possible approach to article 19, but various ways in which it could be expressed. If the demand was manifestly and clearly improper, the guarantor/issuer had a duty not to pay the principal/applicant, but a right not to pay the beneficiary. That requirement could be expressed in various ways. The word "shall" could be used, as in the current text, suggesting that it was a duty not to pay. It would also be satisfactory for the guarantor/issuer to have the right not to pay, or, to use the terminology suggested by the representative of the United States, to withhold payment. But it should be made perfectly clear that such a right applied in relation to the beneficiary and not the principal/applicant.

5. **Ms. CZERWENKA** (Germany) said that it was vital to distinguish between two different relationships, that between the principal/applicant and the guarantor/issuer, and that between the guarantor/issuer and the beneficiary. The Working Group had concluded that the former should be taken into account as well as the latter. One important consideration for her delegation was that the rights of the principal/applicant were also dealt with in article 20 on provisional court measures. Article 20 would not make sense if the rights of the principal/applicant were not dealt with as they now were in article 19. It was helpful to have a rule under which the principal/applicant had a right with respect to the guarantor/issuer and could require him not to pay. Regarding the substance of paragraph (1), the criteria it set out were highly restrictive. In particular, the guarantor/issuer would, in her delegation's view, have no obligation to make investigations; the fact that payment would not be in good faith must be "manifest and clear". There should therefore be no serious problems in applying the text, and Germany considered it acceptable as it stood.

6. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said that, as he understood it, acceptance of article 19 as it stood entailed acceptance of both paragraph (1) (a) and paragraph (1) (b).

7. **Ms. CZERWENKA** (Germany) said that Germany could accept the rule on indemnification in subparagraph (b) since, as a whole, it complemented subparagraph (a).

8. **Mr. VASSEUR** (Observer for Monaco) said that too much attention should not be paid to the relationship between the guarantor/issuer and the principal/applicant, since the obligation entered into by the guarantor/issuer was his own. Although the undertaking was made at the request of the principal/applicant, it was entered into by the guarantor/issuer. Any other view would considerably weaken article 19. He therefore urged that the proposal submitted by the United States be adopted.

9. **Mr. ADENSAMER** (Austria) said that in his view, the clearest solution would be to leave article 19 as it was. Following the comments made by the representatives of Japan and Germany, he could go along with the United States proposal, though it needed to be made perfectly clear that the option to "withhold payment" applied only in regard to the beneficiary. The obligation to withhold payment in the relationship between the principal/applicant and the guarantor/issuer must remain.

10. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that on balance he considered that withholding payment should be a right, as in the United States proposal, rather than an obligation. That right would have to be exercised in the context of certain specified criteria and, in the event of abuse, the guarantor/issuer would be responsible for paying an indemnity to the beneficiary. The right also gave discretionary authority to the guarantor/issuer, who was responsible for any decision he might take.

11. **Mr. LAMBERTZ** (Observer for Sweden) said that the Swedish Government and banking industry were in favour of the "shall" approach, since they considered that whatever was stated in the Convention, the principle not to pay under certain circumstances would always exist. The process of drafting the Convention had been initiated because of the need to cope with the problem of improper payments. He therefore failed to understand the argument that the "shall" approach would create uncertainty for the banks. How could a rule on the obligation not to pay create greater uncertainty than no rule at all? Moreover, in view of the close links between articles 19 and 20, adopting the "may" approach would mean redrafting article 20.

12. There was also the problem of the words "unless the undertaking excludes the application of the Convention" in article 1 (1). If the "shall" approach was adopted, he believed it would be impossible to allow that part of the Convention to be excluded even if the parties to the undertaking chose to exclude the rest.

13. **Mr. HERRMANN** (Secretary of the Commission), referring to the last point raised by the observer for Sweden, said that the exclusion of the Convention as envisaged in article 1 (1) was quite different from the exclusion of certain of its provisions. If the Convention were excluded, there would be another applicable law, which might have a rule on the duty or right to refuse to pay. For the Convention to state that there were mandatory provisions in it so important that national law could not be substituted for them would create tremendous problems. There should be a provision to make it possible to exclude the Convention *in toto* and use another legal system instead at the choice of the parties. But the Secretariat would strongly advise against trying to impose one or two provisions on what would otherwise be a consistent legal system, namely, the law that would otherwise apply.

14. **Mr. ILLESCAS** (Spain) pointed out that there were already three important provisions in the Convention covering the obligations of the guarantor/issuer, namely, articles 14 (2), 16 (1) and 17 (2). Discussion as to whether articles 19 and 20 could be considered separately from one another was therefore superfluous. Articles 14, 16 and 17 made it clear that the guarantor/issuer had to pay in conditions of good faith and that if he did not, the rights of the principal were not affected. Article 19 therefore only had to deal with the possibility of a fraudulent demand for payment, and in that respect the United States proposal was clearer than the present complicated wording of article 19, which, if it were kept, should be made shorter and include a reference to articles 14, 16 and 17.

15. **Mr. STOUFFLET** (France) supported the United States proposal for the wording of paragraph (1) (a). He would, however, suggest that instead of saying that in certain circumstances the guarantor/issuer need not pay, it might be better to say that in certain circumstances the beneficiary did not have the right to be paid. That would then leave it open for the guarantor to pay up in the end if he so wished, even if the beneficiary did not have the right to demand payment.

16. He had serious reservations about paragraph (1) (b), which implied that the principal/applicant would have control over the execution of the payment. That would run counter to the very nature of the independent guarantee, which assumed that the guarantor was going to be independently liable.

17. **Mr. LAMBERTZ** (Observer for Sweden), referring to the statement by the Secretary, said that from the standpoint of the national legislator, it was incorrect to say that the question of the mandatory nature of the Convention was quite different from that of the various articles. If the Convention became national law, the question of which rules were to be mandatory would have to be clarified. He asked if the phrase in article 1 (1) "unless the undertaking excludes the application of the Convention" meant that there would have to be a reservation by countries that wanted the whole system mandatory.

18. **Mr. HERRMANN** (Secretary of the Commission) said that his understanding was that it was for those drafting and adopting the Convention to take a position on whether it should be mandatory or not. The current view as reflected in article 1 (1) of the draft Convention was that the Convention was not a mandatory regime and that countries could opt for another one. That issue was, however, very different from the question of which of the provisions of the Convention might be derogated from by the parties once the Convention was in force. In undertakings that were not international, domestic law would apply, but for the international regime a decision on which provisions should be mandatory had to be taken. He stressed the danger of trying to make only certain provisions of a convention mandatory, which would amount to imposing provisions on any other legal system that might be applicable.

19. **Ms. BAZAROVA** (Russian Federation) wished to retain the idea of the mandatory nature of the obligation not to make payment. The text could perhaps be made clearer by taking the United States proposal and replacing the "may" element by a "shall" element. She supported the retention of paragraph (1) (b) but shared the reservations expressed by the French representative: the independent nature of the undertaking should not be called into question in any way.

20. **Mr. KOZOLCHYK** (United States of America) said that while at one point a bank had a right to withhold payment or to pay as it chose, the moment it acquired knowledge of the existence of a fraud it had a duty not to pay. There was therefore little sense in trying to separate rights and obligations as if they were alternatives; they were two sides of the same coin.

21. The implications of making it an obligation for the guarantor not to pay had not been fully considered. How long would the obligation last? Would it mean that during a certain period the obligation remained a possible cause of action? If that cause of action was regulated by national law, what was that law's statute of limitations? What were the rights of the parties to the transaction while the obligation not to pay remained unresolved? Uncertainty would arise as to when the obligation not to pay ceased to exist as a cause of action.

*(Mr. Kozolchyk, United States of America)*

22. Since work on the Convention has first been begun, there had been a change of attitude on world markets. Both banks and beneficiaries had come to realize that it was not in their interests to insist on too literal an interpretation of the instruments to which they were parties. To adopt the position that the Convention's sole purpose was to ensure that abusive demands were not made would be as bad as to adopt the position that it had no purpose but to ensure finality of payment. European, United States and Australian banking associations had all indicated at various sessions of the Commission and the Working Group that they could not accept some of the articles, definitions and terminology of the draft Convention, which would be contrary to their practice. It was thus necessary to find a compromise, and one now seemed to be emerging on his delegation's proposal.

*The meeting was suspended at 11 a.m. and resumed at 11.25 a.m.*

23. **Mr. GAUTHIER** (Chairman of the Committee of the Whole), summing up the discussion, said that the proposed amendment of article 19, whereby the obligation of the guarantor/issuer not to make payment would become a discretionary right to withhold payment, had apparently caused some delegations misgivings, in view of its possible effect on the position of the principal/applicant and on the matter of provisional court measures. In an attempt to accommodate those concerns, the Commission might wish to consider whether all the elements of the proposed new formulation were necessary or relevant, and also whether the question of penalties imposed in cases of fraud would have an impact on court measures. The current text of article 19 was restrictively worded, and he did not believe that it would open up wide opportunities for banks to challenge the need to make payments, as some delegations seemed to fear.

24. **Mr. FAYERS** (United Kingdom) wondered whether in the text of the United States proposal the phrase "with due regard to general accepted standards of international practice ..." sought to convey anything beyond what was expressed in article 13, paragraph (2). Was the intention to alter the scope of the obligations devolving upon the guarantor/issuer? If their scope were widened, there would be greater justification for adopting the discretionary approach and for accordingly stipulating that the guarantor/issuer had a right not to effect payment.

25. **Mr. KOZOLCHYK** (United States of America) said that the phrase in question had been inserted to meet the Finnish representative's desire for objectivity, with a view to limiting the guarantor/issuer's discretionary power.

26. **Mr. OGARRIO** (Mexico) said that his delegation felt that the term "withhold payment" would be preferable to "refuse payment", not only in the body of article 19 but also in its title.

27. With regard to the imposition of penalties in cases where the guarantor/issuer effected payment in bad faith, the relationship between the guarantor/issuer and the principal/applicant should not, in his delegation's view, be over-emphasized in the Convention. The reference to that relationship in article 20 in connection with exceptional circumstances was acceptable. However, it was more appropriate for the question of penalties for breaches of obligations to be dealt with in the contract between the issuing bank and its customer.

28. **Mr. FARIDI ARAGHI** (Islamic Republic of Iran) said that his delegation had been anxious from the outset that the Convention should safeguard the interests of the beneficiary, or at least the independence of the guarantor/beneficiary relationship. The emphasis should be on non-payment rather than payment. Exceptional cases involving fraud should be left to the jurisdiction of the courts. For the sake of balance, however, he could agree that the guarantor/issuer should in manifest and clear cases have some ground for non-payment, as provided for in the United States proposal.

29. **Ms. FENG Aimin** (China) said that she knew of no actual instances where banks had initiated non-payment measures in their daily transactions. Such steps would be implemented by a bank only after it had received a court order. Her delegation did not feel that the guarantor/issuer should possess the right to decide whether or not payment should be effected. That decision was the responsibility of the courts.

30. **Ms. CZERWENKA** (Germany) said that the main purpose in defining the situations constituting improper demands in article 19 (1) was to explain under what conditions the principal/applicant could intervene. If the text of that article was amended to allow the guarantor/issuer to refuse payment, that would mean admitting other possible instances of improper demands and, in view of the current formulation of article 20, would prevent the principal/applicant from applying for a provisional court order. Her delegation therefore preferred to retain the approach adopted in the existing wording of article 19.

31. **Mr. BONELL** (Italy), endorsing the views of the representative of Germany, said he had two additional remarks. In the opening line of paragraph (1), he would prefer that the phrase "in the view of the guarantor/issuer" should be deleted, which might meet the concerns of the representative of China. In addition, in paragraph (1) (a) (iii), the phrase "and for that reason payment would not be in good faith" should also be deleted, in order to avoid any misunderstanding, as the situations referred to in paragraph (1) did not cover all cases where payment would not be in good faith. According to article 14, it was the duty of the guarantor/issuer to act in good faith, and that covered a much broader spectrum than the situations described in paragraph (1).

32. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said there were two possibilities. One was to keep the present text, perhaps deleting the phrase "in the view of the guarantor/issuer" as being too subjective: if the facts were manifest and clear, they should be so to anybody. As to the matter of paragraph (1) (a) (i), in certain countries the author of the falsification must be the beneficiary, but that was not the case in many others. The Working Group had therefore felt that the restriction to falsification by the beneficiary should not be retained. Concerning the question of whether the reference to good faith was necessary, in certain jurisdictions that was in fact the test, whereas in others it simply sufficed that the grounds for non-payment be manifest and clear. The Group had therefore considered that, for the purposes of the Convention a combination might be required, under which the situation must be manifest and clear and must also be one in which, for that reason, payment would not be in good faith. That was new language which had been very specifically coined for the present Convention.

*(Mr. Gauthier, Chairman of the Committee of the Whole)*

33. The other option was to say that where the issuer was in good faith and where it was manifest and clear to that issuer that any of the three circumstances described in paragraph (1) existed, then that guarantor had a right to withhold payment to the beneficiary. As suggested earlier by the representative of Finland, a sentence could be added to the effect that that rule did not affect the rights that the applicant might have under its arrangement with the bank, nor the right the applicant might have to seek relief under article 20. The idea was to show clearly that the right to withhold arose solely within the context of the guarantor/beneficiary relationship, and that other relationships were not affected either in contractual terms or with regard to an applicant's ability to seek provisional measures from a court. To sum up, the Commission should choose to focus either on the right to withhold, making it clear that it did not affect the applicant/guarantor relationship, or on the fact that in certain manifest and clear circumstances the guarantor must not pay, although if the applicant had helped to bring those circumstances to the knowledge of the guarantor, then he assumed the risks by indemnifying the guarantor.

34. **Mr. FAYERS** (United Kingdom) said that he agreed with the suggestion by the representative of France that the last line of paragraph (1) (a) be inverted. As now worded, it required the guarantor to concentrate on whether what he was doing was in good faith. Rather, he should concentrate on whether the beneficiary was making the demand in good faith. The wording could be replaced by something along the lines of "and for that reason the claim by the beneficiary is not in good faith". That might make it easier for some delegations to accept the mandatory approach.

35. **Mr. AL-NASSER** (Saudi Arabia) said that the main difficulty seemed to be that the Commission was concentrating on protecting the issuer and the applicant, while not taking due care of the beneficiary. In articles 14, 17, 19 and 20, it was a question of the beneficiary being engaged in falsification or negligence. With regard to such cases the criteria in all letters of credit required that if falsification was proved, a civil case could be brought against the beneficiary in order to recuperate what had been paid unduly. However, the beneficiary could also be the injured party. In Saudi Arabia, for example, which was a consumer of letters of credit, there were numerous problems, as most banks that guaranteed applicants were foreign ones. When a claim was presented or a demand made, they tended to look for reasons for non-payment. He cited the case of a banking consortium which had issued a letter of credit to guarantee the implementation by a number of companies of specific projects in Saudi Arabia. When, however, the State had wished to cash the letter of credit, the banks had tried to find fault with the criteria it contained, in order to avoid making payment. The principle of sovereignty required the consortium to abide by the law of the land under which the letter of credit had been issued. It had in the end admitted its mistake and paid what it was required to pay. None the less, that example illustrated the problems of the beneficiary, which the Commission in its present discussion was neglecting in favour of those of the issuer. A satisfactory solution would be one which guaranteed the rights of both parties.

*The meeting rose at 12.30 p.m.*